



April 30, 2002

Mr. Tim Molina
Assistant Attorney General
Assistant Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2002-2242

Dear Mr. Molina:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162080.

The Office of the Attorney General (the "attorney general") received a request for copies of information pertaining to a particular motor vehicle accident. You claim that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, as well as pursuant to Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that the "Vehicle Damage Report" is subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. See Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). The "Vehicle Damage Report" constitutes a completed report under section 552.022(a)(1) of the Government Code. Although you claim that this report is excepted from disclosure pursuant to sections 552.103, 552.107 and 552.111 of the Government Code, we note that these exceptions to disclosure are discretionary exceptions under the Public Information Act and, as such, do not constitute "other law" that makes

information confidential.¹ Accordingly, we do not address your claims regarding sections 552.103, 552.107 and 552.111 of the Government Code with respect to this report.

We note, however, that the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court recently held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will determine whether the report is confidential under rule 503. Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503.

A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See id.* Therefore, in order for information to be withheld from disclosure under rule 503, a governmental body must: (1) show that the document is a communication

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential.

transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Based on our review of your arguments and the “Vehicle Damage Report,” we conclude that you have failed to demonstrate that any portion of this report constitutes confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Accordingly, the attorney general may not withhold any portion of the “Vehicle Damage Report” from disclosure pursuant to rule 503 of the Texas Rules of Evidence.

The attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. For purposes of section 552.022, an attorney’s core work product is confidential under rule 192.5. Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *See* Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *See id.* Based on our review of your arguments and the “Vehicle Damage Report,” we conclude that you have failed to demonstrate that any portion of this report constitutes the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial. Accordingly, the attorney general may not withhold any portion of this report from disclosure pursuant to rule 192.5 of the Texas Rules of Civil Procedure.

However, we note that the “Vehicle Damage Report” contains a Texas license plate number that is subject to section 552.130 of the Government Code. Section 552.130 excepts information from disclosure that relates to a motor vehicle operator’s or driver’s license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov’t Code § 552.130. Accordingly, the attorney general must withhold the Texas license plate number that we have marked from disclosure pursuant to section 552.130 of the Government Code. However, the attorney general must release the remaining portions of this report to the requestor.

You claim that the remaining information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code, § 552.103(a),(c). The attorney general maintains the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The attorney general must meet both prongs of this test for information to be excepted under section 552.103(a).

A governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture" when establishing that litigation is reasonably anticipated. *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

You state that, once the requestor's claim for repair was denied, the requestor demanded an official denial letter from the attorney general and added that the attorney general would be hearing soon from the requestor's insurance agent. You also state that this matter would not

² In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

have been referred to the attorney general's Tort Litigation division if litigation was not reasonably anticipated. Based on our review of your arguments and the remaining information at issue, we do not agree that these representations constitute concrete evidence that the attorney general reasonably anticipated litigation on the date that it received the request for purposes of section 552.103. Accordingly, we conclude that the attorney general may not withhold any portion of the remaining information from disclosure pursuant to section 552.103 of the Government Code.

However, you also claim that the remaining information is excepted from disclosure pursuant to the deliberative process privilege incorporated in section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); see also *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169, at * 5 (Tex. App.--Jan. 11, 2001, no pet. h.). The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.). Section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. See *Arlington Indep. Sch. Dist.* at * 6-7; see also Open Records Decision No. 615 at 4-5. In addition, an agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. See Open Records Decision No. 615 at 5-6 (1993).

You claim that the remaining information contains the advice, opinion, or recommendations of attorney general staff attorneys. Based on our review of your arguments and the remaining information, we do not agree that any portion of this information constitutes communications consisting of advice, opinions, and recommendations reflecting the policymaking processes of the attorney general. Rather, we find that these communications concern personnel and administrative matters that do not concern the policymaking functions of the attorney general. Accordingly, we conclude that the attorney general may not withhold any portion of the remaining information from disclosure pursuant to the deliberative process privilege which is incorporated into section 552.111 of the Government Code.

You also claim that the remaining information is excepted from disclosure as attorney work product pursuant to section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that

the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See* Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See id.* at 4. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. Based on our review of your arguments and the remaining information, we conclude that you have failed to demonstrate how any of this information constitutes attorney work product developed under a good faith belief that there was a substantial chance that litigation would ensue against the client agency. Accordingly, we conclude that the attorney general may not withhold any portion of the remaining information from disclosure as attorney work product pursuant to section 552.111 of the Government Code.

You also claim that the remaining information is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information encompassed by the attorney-client privilege. We note that in instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Consequently, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *See* Open Records Decision No. 574 at 5 (1990). Based on our review of your arguments and the remaining information, we conclude that some of this information constitutes client confidences provided to an attorney in furtherance of the rendition of legal services to the client. Accordingly, the attorney general may withhold the information that we have marked from disclosure pursuant to section 552.107 of the Government Code.

In summary, the attorney general must withhold the Texas license plate number that we have marked in the "Vehicle Damage Report" pursuant to section 552.130 of the Government Code. The attorney general may withhold the information that we have marked pursuant to section 552.107 of the Government Code. The attorney general must release the remaining information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald J. Bounds". The signature is fluid and cursive, with a large initial "R" and a stylized "B".

Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 162080

Enc: Marked documents

cc: Mr. Martin Fried
Ms. Janet Fried
2428 Redfield Drive
Plano, Texas 75025-2333
(w/o enclosures)